

LETTER OPINION
97-L-71

June 18, 1997

Mr. William Binek
Chief Counsel
Public Service Commission
State Capitol
Bismarck, ND 58505-0480

Dear Mr. Binek:

Thank you for your letter asking several questions about the application of the Public Service Commission policy concerning conflicts of interest. These questions were asked in light of my opinion to you issued on May 3, 1996. 1996 N.D. Op. Att'y Gen. 53.

The Public Service Commission has adopted a policy addressing conflicts of interest which provides:

No commissioner, commission employee, or agent, shall participate in a commission decision if a conflict of interest, real or apparent, would be involved. A conflict would arise when the commissioner, the employee or agent, any member or his immediate family, his partner or an individual firm or organization which employs or is about employ the commissioner, commission employee, his immediate family member, or partner has a financial or other interest directly and substantially affected by the commission decision.

Memorandum to P.S.C. staff, December 15, 1987. In 1996 N.D. Op. Att'y Gen. 53, I determined that this policy defined a conflict of interest as occurring where an adult child of a commissioner was employed by a party to a contested hearing or proceeding before the Commission.

At the time the 1996 opinion was issued, an adult child of a Public Service Commission member and that child's spouse were both employed by a telecommunications company at an out-of-state location. Further, the commissioner's child participated in a 401K plan offered by the employer which included ownership of company stock. In your letter you write that the commissioner's child has changed employment and is presently employed by a subsidiary of a different telecommunications company, but retains several shares of stock in

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the former employer under its 401K plan in which the child's interest is 60 percent vested. You further note that the child's spouse remains employed by the telecommunications company involved in the prior opinion.

You first ask whether the child's remaining interest in the corporate stock under the 401K plan presents a conflict of interest. The object of a conflict of interest policy is to remove or limit the possibility that personal issues may influence an official's decision. 1995 N.D. Op. Att'y Gen. 21, 25. The purpose and context of words used in conflict of interest policies assists in determining the interpretation of the policy. As I noted in my prior opinion defining "immediate family" under the Commission's policy:

Where the purpose of the phrase "immediate family" in a contract excluding immediate family members of people employed by a contest sponsor from eligibility to participate in the contest was to bolster public confidence in the impartiality of the contest, a court adopted a broad definition and held that a parent residing in a different household than a child is an immediate family member of that child. Bellows v. Delaware McDonalds Corp., 522 N.W.2d 707, 709-710 (Mich. Ct. App. 1994). Cases interpreting the phrase "immediate family" broadly to include immediate family members who are not residents in the same household are a better reasoned line of cases in the context of a conflict of interest policy for government officials or employees because a broad definition would uphold the purpose behind the policy by including more persons with whom the official has strong personal ties which may affect or appear to affect the official's or employee's judgment.

1996 N.D. Op. Att'y Gen. 53, 56. A further issue to bear in mind is that the Public Service Commission's policy applies to a "real or apparent" conflict of interest. This brings into the discussion a consideration of the appearance of impropriety doctrine. See, e.g., Sargent County Bank v. Wentworth, 500 N.W.2d 862 (N.D. 1993). For a discussion of the appearance of impropriety doctrine, see 1995 N.D. Op. Att'y Gen. L-60 (March 9 letter to Mattson).

Under the Commission's policy, a conflict of interest arises when a member of a commissioner's immediate family has a "financial or other interest directly and substantially affected" by a Commission

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decision. In a similar context, the words "direct" and "substantial" have been defined:

Direct means "operating by an immediate connection or relation, instead of operating through a medium." Black's Law Dictionary 459 (6th ed. 1990). "A direct interest, such as would render the interested party incompetent to testify in regard to the matter, is an interest which is certain, and not contingent or doubtful." Id. at 460. Substantial means "[o]f real worth and importance; of considerable value; . . . something worthwhile as distinguished from something without value or merely nominal." Id. at 1428, citing Seglem v. Skelly Oil Co., 65 P.2d 553, 554 (Kan. 1937); see also Miller v. Commissioner of Internal Revenue, 84 F.2d 415, 418 (6th Cir. 1936) ("In the commonly accepted legal sense, a substantial interest is something more than a merely nominal interest. . . ."); Yetman v. Naumann, 492 P.2d 1252, 1255 (Ariz. Ct. App. 1972) ("substantial interest" defined in statute as any interest other than a "remote interest").

1995 N.D. Op. Att'y Gen. 21, 24-25. A financial interest is an interest equated with money or its equivalent. Black's Law Dictionary 631 (6th ed. 1990).

Although the child's shares of stock in the 401K plan from the former employer is a financial interest, the question of whether that interest would be directly and substantially affected by a Commission decision is a question of fact involving an analysis of the possible impact of the decision on the share's value, the payment of dividends, or other factors. This office does not issue opinions on questions of fact. 1994 N.D. Op. Att'y Gen. L-327 (December 13 letter to Mattson); 1995 N.D. Op. Att'y Gen. 21; Letter from Attorney General Heidi Heitkamp to Kevin D. Pifer, October 3, 1996. A fact question of this nature can best be answered by the commissioner with the assistance of one of the special assistant attorneys general assigned to the Public Service Commission; however if the issue is still in doubt, I suggest that the matter be decided by the other members of the Public Service Commission. 1995 N.D. Op. Att'y Gen. 21.

Your second question is whether the employment of the spouse of a commissioner's child with a telecommunications company presents a conflict of interest for that commissioner in contested proceedings

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involving that company. Under the Commission's policy, there is a conflict when a member of a commissioner's immediate family is employed by an entity which has a financial or other interest directly and substantially affected by a Commission decision. As previously stated, such a conflict exists when an adult child of a commissioner is employed by a party contesting a proceeding before the Commission. 1996 N.D. Op. Att'y Gen. 53. The question in this instance is whether a son-in-law or daughter-in-law is a member of the commissioner's immediate family.

Several courts have addressed the status of an in-law as a family member. In a proceeding under a rent control statute which allowed the landlord to increase rent if another person moved into the premises with the tenant, but prohibited an increase in rent if an immediate family member moved in with the tenant, the court held that an immediate family member would include a son-in-law when the tenant's daughter and son-in-law moved in with the tenant. Grant-Morris Management Corp. v. Weaver, 174 N.Y.S.2d 759, 760 (App. Div. 1958). Similarly, for purposes of an attorney discipline case, a lawyer was held to act improperly in drafting and witnessing a will which favored the lawyer's mother-in-law. Matter of Oliver, 530 N.Y.S.2d. 890, 891-892 (App. Div. 1988).

However, there are cases emphasizing the word "immediate" as applied to define who is a family member:

In any event, appellees' interpretation ignores the word "immediate" which modifies the term "member of the permanent resident's family." "Immediate" when used in terms of relations between persons is defined by Webster's 3rd International Dictionary as "having no individual intervening, being next in line or relation." The 5th edition of Black's Law Dictionary defines "immediate" as "next in line or relation, directly connected, not secondary or remote. . . not separated by the intervention of any . . . relation." (Emphasis added.) Under these definitions, the immediate family of a permanent resident would include only the parents or children of the permanent resident. A sibling of a permanent resident would not be part of his immediate family because there is the intervening relation of parents between siblings, nor would other collateral relatives of the permanent resident be a part of the immediate family. Therefore, the practical affect of the covenant is to exclude the residency of all children under the age of sixteen. This

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construction is in harmony with the plainly stated intent of the covenant, which is "to preserve the character of this Condominium as an adult residential community."

Covered Bridge Condominium Ass'n v. Chambliss, 705 S.W.2d 211, 214 (Tex. App. 1985). (Emphasis in original.) This case is very narrow for use in interpreting a conflict of interest policy because "immediate family" generally includes collateral relatives such as siblings in addition to lineal relatives such as parents and children. Black's Law Dictionary 750 (6th ed. 1990). However, the general reasoning of that case may be applied to the Commission's conflict of interest policy. While a commissioner's child is an immediate family member, that child's spouse is not an immediate family member because the relationship of a son-in-law or daughter-in-law depends upon the marriage of that person to one's child. Similarly, this office has previously determined that "kindred" as used in N.D.C.C. § 23-06-03(2) includes lineal and collateral blood relatives but not relatives by marriage. 1981 N.D. Op. Att'y Gen. 336.

Therefore, it is my opinion that, as generally used, the phrase "immediate family" does not include a son-in-law or a daughter-in-law, although special circumstances such as membership in the same household or a special benefit which will return to the Public Service Commissioner may be further reason, in light of the appearance of impropriety doctrine, to consider a son-in-law or daughter-in-law as an immediate family member under the Public Service Commission's conflict of interest policy. Whether such special circumstances exist is a question of fact which must be resolved in each specific instance.

Your third question is whether employment of a commissioner's child by a subsidiary of a telecommunications company presents a conflict of interest involving only that subsidiary or whether the conflict of interest would apply to the parent company and any of that company's other subsidiaries. The Public Service Commission's policy defines a conflict of interest as occurring "when . . . an individual firm or organization which employs or is about to employ . . . [a commissioner's] immediate family member . . . has a financial or other interest directly and substantially affected by the commission decision." Essentially, the question concerns the definition of the "individual firm or organization" employing the commissioner's immediate family member. In this context, "individual" means "existing as a distinct entity; separate; . . . distinguished by . . . traits; distinctive." The American Heritage Dictionary 656 (2d

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coll. ed. 1991). The policy's use of the word "individual" to limit the words "firm or organization" implies that the separate existence of a subsidiary corporation from a parent corporation would be recognized.

Ordinarily, a corporation will be looked upon as a legal entity unless sufficient reason to the contrary is shown. Family Center Drug Store, Inc. v. North Dakota St. Bd. of Pharm., 181 N.W.2d 738, 745 (N.D. 1970). There is no reason to disregard a corporation's separate identity from a parent corporation if the only evidence to do so consists of the fact that one corporation is a wholly owned subsidiary of another corporation. Industrial Commission of North Dakota v. Wilber, 453 N.W.2d 824, 825 (N.D. 1990). The North Dakota Supreme Court has determined the standards it will use in determining whether to disregard a corporation's identity:

It has been held that factors considered significant in determining whether or not to disregard the corporate entity include: insufficient capitalization for the purposes of the corporate undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of the debtor corporation at the time of the transaction in question, siphoning of funds by the dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and the existence of the corporation as merely a facade for individual dealings.

Hilzendager v. Skwarok, 335 N.W.2d 768, 774 (N.D. 1983). There is nothing improper in incorporating a business for the purpose of avoiding or escaping personal responsibility because that is one of the reasons people incorporate, and people dealing with corporations know, or are presumed to know, the law in that regard. Fire Ass'n of Philadelphia v. Vantine Paint & Glass Co., 133 N.W.2d 426, 430-431 (N.D. 1965).

However, the corporate identity of a subsidiary has been disregarded where it appeared that the actual control of the subsidiary was in the parent corporation or another related corporation and that the subsidiary "is merely a corporation on paper." Family Center Drug Store, Inc., 181 N.W.2d at 745. Where one corporation was in common ownership with another corporation, and the first corporation was never adequately capitalized, did not have employees or a separate office, hired the other corporation's employees for all or almost all of its work, and transactions between the corporations or between the

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corporation and its owner had the effect of siphoning funds from the corporation to the owner, it was appropriate for the trial court to find that the first corporation "was nothing more than a 'pass through' corporation," and a facade which could be set aside in equity. Jablonsky v. Klemm, 377 N.W.2d 560, 566-567 (N.D. 1985). However, corporate existence was not disregarded where a single partnership had been separated into four corporations, each corporation operating under the same name as the former business except for location, but all corporate formalities were observed for each of the successor corporations, the party seeking to disregard the corporation's separate identities had not relied upon any previous dealings with the corporations or their owners that would lead to the belief that they were one entity, and there was no evidence showing anything unfair or fraudulent in the conduct of the defending corporations or of the individuals who own the corporations such as using the separate corporations as a cover for an ulterior purpose. Fire Ass'n of Philadelphia, 133 N.W.2d at 431-432.

The existence of an "individual firm or organization" employing the commissioner's immediate family member would ordinarily not be disregarded unless there were legal grounds shown to disregard the corporate identity. However, where a parent corporation or another subsidiary corporation exercises such degree of control over the employing subsidiary that it could exercise influence over the conditions or terms of employment of the commissioner's child (including salary, job title, benefits, promotions, or other relevant matters), then there would be a basis to set aside the subsidiary's identity and view the parent corporation or other subsidiary corporation as being the "individual firm or organization" employing the commissioner's child. This is necessarily a question of fact in any given instance, and cannot be answered in a legal opinion. Again, the prohibition in the Public Service Commission's policy against a "real or apparent" conflict of interest implies that the Commission should also consider whether a parent corporation and its subsidiary corporation employing the commissioner's immediate family member would present either an apparent conflict of interest or an actual conflict of interest.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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